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In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1234 and 76-1261

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

BARBARA ROSS, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

HILDA ABRAMS, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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Brief for the Respondents

QUESTION PRESENTED

Whether 12 U.S.C. §§ 1715z-1(f)(3) *and* (g) (Supp. V 1975) require the Secretary of the Department of Housing and Urban Development (HUD) to establish and implement an operating subsidy program.

STATUTES INVOLVED

Statutory provisions are set forth in the appendix to the Secretary's Brief. Pet. Br. App. pp. 26-31. Since the filing of the Secretary's Brief, Congress amended 12 U.S.C.

§§ 1715z-1(f)(3) and (g). Those amendments are set out in Respondents' Appendix.

STATEMENT

Respondents in these consolidated cases are lower income tenants of two Section 236 federally subsidized and insured multifamily projects who were charged excessive rents because they were denied the benefits of the operating subsidy program. In the spring of 1975, the Petitioner, Secretary of HUD (Secretary) approved a rent increase of 18% for tenants residing in Upland Apartments, Baltimore, Maryland. *Ross* No. 76-1234. This rental increase, if not enjoined, would have required Respondents to pay over 30%, and in some instances in excess of 100%, of their adjusted family income for rent. Joint Appendix (J.A.) pp. 13-15. For Meyler Park Apartments, the Secretary between November 1974 and September 1975 approved two rent increases totalling 21.2%. The combined rental increases required Respondents to pay from 30-46% of their adjusted incomes for rent. *Abrams* No. 76-1261, J.A. pp. 92, 108-109. The rent increases in both of these projects were attributed, in part, to "dramatic" increases in utility costs and property taxes.[1] J.A. pp. 11, 123, 129. Respondents could not pay these increases and knew that unless an operating subsidy was provided to their projects, they would be faced with Hobson's choice of foregoing some of life's necessities (J.A. pp. 80-90); moving to cheaper but undoubtedly inadequate accommodations (J.A. pp. 1 no. 6, 110; *Ross* Appendix on Appeal, p. 42); or facing summary eviction.

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1. For Upland Apartments, the project owner estimated substantially increased costs for 1975, including $34,724 for real estate taxes and $120,000 for utilities. J.A. pp. 1 no. 6, 2 no. 14, *Ross* Appendix on Appeal, pp. 41, 81. The project owner for Meyler Park stated that in the fiscal year ending February 28, 1975, the project sustained a net loss of $41,831. J.A. p. 111.

Respondents would not have faced this choice, if the Secretary had administered the Section 236 program consistently with the will of Congress. The Section 236 program is one of a number of federal housing programs designed to help achieve the national housing goal "of . . . a decent home and suitable living environment for every American family." 12 U.S.C. § 1441 (1970). In particular, the Section 236 program was designed "for the purpose of reducing rentals for lower income families," 12 U.S.C. § 1715z-1(a) (Supp. V 1975) by providing for federal mortgage insurance and interest reduction payments to project owners so that rental rates to the tenants could be lowered accordingly.

As the program was originally designed, all tenants would pay at least the "basic rent" or 25% of adjusted income, whichever is greater. Basic rent is designed to be sufficient to operate the project and meet the payments on a 1% interest mortgage. No tenant would pay more than "fair market rent" computed on the basis of operating costs plus amortization of the mortgage at the commercial interest rates. 12 U.S.C. § 1715z-1(f)(1) (Supp. V 1975). The interest reduction subsidy payment equals the difference between the hypothetical 1% interest and the commercial interest actually charged.

Congress originally anticipated that providing an interest reduction subsidy would ensure that the rents would be reasonable for lower income tenants. However, rapidly rising utility costs and property taxes outstripped the capacity of the interest reduction subsidy program to hold rents at reasonable levels. Accordingly, Congress in 1974, amended the Section 236 program to help alleviate a number of "structural" problems in the program. One amendment created the "deep subsidy" program which permits

the very poorest families to occupy 20% of the units in projects constructed after August 22, 1974. 12 U.S.C. § 1715z-1(f)(2) (Supp. V 1975).

At issue here is another amendment establishing the "operating subsidy" program. This program requires the Secretary to make payments to project owners to offset reasonable increases in utility charges and local property taxes, so as to obviate the necessity of raising the tenants' rent to cover these increased costs. The subsidy is only available on behalf of those tenants who pay more than 30%[2] of their income for rent. 12 U.S.C. § 1715z-1(f)(3).

Congress required that the Secretary begin implementation of the operating subsidy program by February 18, 1975. It ordered the Secretary to establish an initial operating expense level for existing projects by that date and provided two sources of funding: (1) it directed that rents collected in excess of basic rent "shall be credited to a reserve fund to be used by the Secretary to make" operating subsidy payments; (2) it also authorized the use of contract authority to make operating subsidy payments.[3]

In October 1977, Congress amended the operating subsidy program to reaffirm that the program is mandatory and that operating subsidy payments must be made from the reserve fund. Pub. L. No. 95-128 (October 12, 1977) Appendix pp. 1-2.

Despite the repeated congressional use of mandatory language and the provision of funding, the Secretary has

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2. Tenants who pay their own utilities become eligible when their rent exceeds 25% of adjusted income.

3. 12 U.S.C. § 1715z-1(g) (Supp. V 1975). *See also, Abrams v. Hills*, 547 F.2d 1062, 1064-1067 (9th Cir. 1976); Secretary's Petition for a Writ of *Certiorari* Appendix in Abrams, No. 76-1261 (*Abrams Cert.* Pet. App.) pp. 3a-10a; *Ross v. Community Services, Inc.*, 396 F. Supp. 278, 281 (D.Md. 1975); Secretary's Petition for a Writ of *Certiorari* Appendix in *Ross*, No. 76-1234 (*Ross Cert.* Pet. App.) pp. 7a-8a.

for over 3 years refused to implement the operating subsidy program. Thus, Respondents filed suits seeking to enjoin the rental increases imposed by the owners of the projects and to order the Secretary to make operating subsidy payments.[4] Summary judgment was entered in favor of both the *Ross* and *Abrams* Respondents. In both cases the Courts rejected the Secretary's arguments that implementation of the operating subsidy program is discretionary and mandated the Secretary to make payments.[5] Payments in *Abrams* were ordered commencing on February 18, 1975[6], and in *Ross* payments were ordered as of May 1, 1975. The Fourth and Ninth Circuits affirmed the lower Courts' decisions in every aspect.[7]

SUMMARY OF ARGUMENT

The judgments of the Courts below should be affirmed. The overall scheme of the Section 236 program, the language of the operating subsidy sub-sections, and concurrent and

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4. Both *Abrams* Respondents and the owners of Meyler Park Apartments made application for the operating subsidies. The Secretary failed to respond to either of these requests. J.A. pp. 95, 134.

5. *Ross v. Community Services, Inc.*, 396 F. Supp. at 286; 405 F. Supp. 831, 837 (D.Md. 1975), *Ross Cert.* Pet. App. pp. 20a, 31a; *Abrams v. Hills*, 415 F. Supp. 550, 552, 553 (C.D.Cal. 1975), *Abrams Cert.* Pet. App. pp. 27a, 29a.

6. The Secretary on July 1, 1976, while appealing the lower Court decision, made available to the *Abrams* Respondents Section 8 benefits which reduced their rents to 25% of their family income. 42 U.S.C. § 1437f (Supp. V 1975). Because tenants who pay no more than 25% of their income for rent are ineligible to receive the benefits of the operating subsidy program, the Secretary argued to the Ninth Circuit that the *Abrams* Respondents' claim was prospectively moot. The Ninth Circuit considered the Respondents' claim for payments from February 18, 1975 to July 1, 1976, an alive and important issue and hence affirmed the District Court's Order.

7. *See, Abrams v. Hills*, 547 F.2d at 1071, *Abrams Cert.* Pet. App. p. 20a; *Ross v. Community Services, Inc.*, was affirmed *per curiam*, 544 F.2d 514 (4th Cir. 1976), *Ross Cert.* Pet. App. p. 3a.

post-enactment legislative history all demonstrate that the operating subsidy program is mandatory. Congress intended that the reserve fund, which presently contains $54.4 million, be used to implement the program, and that while contract authority should be used to meet operating subsidy requirements that exceed reserve fund resources, utilization of contract authority is not necessary to spend the reserve fund.

If this Court should find that the operating subsidy program is not mandatory, then Respondents submit that the judgments of the Courts below should be affirmed on the grounds that the Secretary abused her discretion by failing to implement the program. Her decision not to implement was an abuse of discretion because she considered irrelevant factors and her decision, viewed in light of the relevant factors, was clearly erroneous. Contract authority has been available and it could have been allocated, if necessary, to the operating subsidy program without jeopardizing the Secretary's alleged other commitments.

The Secretary's refusal to implement the operating subsidy program is subject to judicial review.

ARGUMENT

The primary issue raised in these consolidated cases is whether the Secretary has a mandatory duty under the National Housing Act, 12 U.S.C. § 1701, *et seq.* (1970 and Supp. V 1975), to make operating subsidy payments. Respondents submit, and the Courts below found, that the provisions of Section 236(f)(3) and (g) are mandatory and that the Secretary had a ministerial duty to implement the program. The Secretary's argument that she has discretion not to implement the operating subsidy program has been "flatly and unequivocally rejected by every court

that has considered the issue."[8] Each of these eighteen Courts reviewed the statutory language, concurrent and subsequent legislative history and determined that the Secretary's failure to pay operating subsidies is unsupportable and frustrates congressional intent.

I. The Secretary's Refusal to Make Additional Assistance Payments for Operating Subsidies Violates the Mandatory Language of Section 236(f)(3) and (g) and Frustrates Congressional Intent

A. THE LANGUAGE OF THE STATUTE AND THE OPERATING SUBSIDY FINANCING SCHEME DEMONSTRATE THAT THE PROGRAM IS MANDATORY

Congress required the Secretary to take two steps to set the stage for payment of operating subsidies: first, "[f]or each project there *shall* be established an initial operating expense level" (12 U.S.C. § 1715z-1(f)(3) (Supp. V 1975)) which "for any project assisted under a contract entered into prior to August 22, 1974, *shall* be established by the Secretary not later than 180 days after August 22, 1974" (12 U.S.C. § 1715z-1(g) (Supp. V 1975)); second, charges collected in excess of basic rent must be paid to the Secretary and "*shall* be credited to a reserve fund *to be used* by the Secretary to make additional assistance payments" (12 U.S.C. § 1715z-1(g)) for the operating subsidy program.[9] (Emphasis added.)

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8. *Abrams v. Hills*, 547 F.2d at 1067, *Abrams Cert.* Pet. App. p. 11a and cases cited there. *See also, Abrams v. Hills*, 415 F. Supp. 550; *Battles Farm Co. v. Hills*, 414 F. Supp. 521 (D.D.C. 1976); *Dussault v. Hills*, No. CV 76-147 (D.N.H., Jan. 3, 1977); *Gibson v. Harris*, No. 77-0488-R (E.D.Va., Sept. 30, 1977); *Haas v. Harris*, No. 77-0235 (D.R.I., Aug. 11, 1977); *Lefort v. Hills*, No. 76-0286 (D.R.I., Nov. 19, 1976); *Parker Square Tenants Assn. v. HUD*, No. 75 CV 577-W-3 (W.D.Mo., Jan. 27, 1976); *Sicuro v. Hills*, 415 F. Supp. 553 (C.D.Cal. 1976); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976).

9. These conditions are specifically set out in the statute. They are not plucked from thin air as are the supposed conditions estab-

The purpose of this mandatory framework is to ensure that operating subsidy payments are made. The sole function of the initial operating expense level is to provide the Secretary with a baseline for determining the amount of operating subsidy payments. Congress would hardly have required the Secretary to establish, by a date certain,[10] these expense levels if it did not intend that payments be made. Similarly, the only explanation for maintenance of a separate reserve fund and requiring its use for operating subsidies is that Congress intended that payments be made.

The scheme for expenditure of the reserve fund further reveals that Congress intended that the operating subsidy program be mandatory and that the Secretary should not simply hoard large sums.[11] Not knowing whether the reserve fund would be insufficient or more than sufficient to cover operating subsidy payments, Congress established

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lished by the Secretary. The Secretary reads into the statute a requirement that she must "decide promptly whether to implement the program." If she decides not to implement, then no obligations attach. But if she decides to implement, then, but only then, must she follow the letter and spirit of the statute. *See*, Pet. Br., p. 9, fn. 7. Such a condition precedent simply does not appear in the statute or the legislative history.

10. The fact that Congress mandated a specific date of implementation is significant. There are numerous provisions of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (HCDA 1974) which are silent as to time of implementation. For example, the Section 236 deep subsidy and interest reduction subsidy programs can be implemented at any time. 12 U.S.C. §§ 1715z-1 (1970 and Supp. V 1975) and 1715z-1 (f)(2) (Supp. V 1975). In addition, Congress has established other programs and allowed HUD more time for implementation. *See*, Section 201(b) of HCDA 1974, 42 U.S.C. § 1437 (Supp. V 1975) (Note).

11. The Secretary states in her brief that as of December 31, 1976, there was $54.4 million in the reserve fund and that it is accumulating at the rate of $12 million per year. Pet. Br., p. 14, fn. 15. Surely Congress intended that that money "be used . . . to make additional assistance payments" for operating subsidies. 12 U.S.C. §1715z-1(g).

a scheme which would cover these possibilities: (1) in the event of a shortfall, Congress authorized the Secretary to use contract authority in addition to the reserve fund[12] and (2) in the event of a surplus in the reserve fund, Congress allowed it to be used for other programs, but only after operating subsidy payments had been made.[13]

B. THE STATUTORY CONTEXT OF THE PROGRAM AND ITS LEGISLATIVE HISTORY DEMONSTRATE THAT IT IS MANDATORY

The Section 236 federally subsidized housing program was designed "to assist families with incomes so low that they could not otherwise decently house themselves" (12 U.S.C. § 1701t (Supp. V 1975)) and "[f]or the purpose of reducing rentals for lower income families" (12 U.S.C.

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12. In a conference report accompanying the supplemental appropriations act for FY 1975, Congress authorized the Secretary to use available contract authority to make additional assistance payments to cover reserve fund shortfalls. H.R. Rep. No. 1503, 93d Cong., 2d Sess. 5 (1974); S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). In addition, the statute provides that the Secretary pay additional assistance payments for operating subsidies to the extent possible *"up to"* the total amount of the increased operating costs. 12 U.S.C. § 1715z-1 (f)(3). (Emphasis added.)

See also, Ross v. Community Services, Inc., 405 F. Supp. at 836 (D.Md. 1975), *Ross Cert.* Pet. App. pp. 36a-37a in which the Court recognized the power of the Secretary to " 'create reasonable classifications and eligibility requirements in order to allocate the limited funds available to her'," citing *Morton v. Ruiz*, 415 U.S. 199, 230 (1974).

13. In 1974, Congress provided that if the needs of the operating subsidy program were met, the excess money in the reserve fund "shall be credited to the appropriation authorized by subsection (i)" of the Section 236 program and made available to make "assistance payments" (*i.e.*, interest reduction payments). 12 U.S.C. §1715z-1(g). *See, Abrams v. Hills*, 547 F.2d at 1069. *Abrams Cert.* Pet. App. pp. 16a-17a. S. Rep. No. 693, 93d Cong., 2d Sess. 109, *reprinted in* [1974] U.S. Code Cong. & Ad. News 4273, 4375. This provision was expanded by an appropriations act in 1976 to provide that after implementing the operating subsidy program the Secretary could spend the surplus in the reserve fund for a variety of housing programs in addition to the Section 236 interest reduction subsidy program. Department of Housing and Urban Development-Independent Agencies Appropriations 1977, Pub.L. No. 94-378; 90 Stat. 1095, 1096 (1976). *See also*, pp. 25-29, *infra*.

§ 1715z-1(a)). The Secretary's hoarding of over $54.4 million in the reserve fund, her refusal to expend that money to benefit low-income families in federally subsidized housing, and her approval of rent increases to cover increased costs of property taxes and utilities which she should be subsidizing are directly contrary to the intent of Congress in establishing the subsidized housing program. The effect of her refusal to expend the reserve fund is to increase the rental rates paid by low-income tenants or precipitate default and foreclosures of the projects. Congress' intent was exactly the opposite: to decrease, or at least stabilize, the rentals paid by lower income families and to assure the financial viability of the projects.

As evidenced by the legislative history, the refusal of the Secretary to use the reserve fund for operating subsidies is also contrary to the specific intent of Congress in enacting the program.[14] Congress was concerned with the prob-

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14. The Report of the Senate Committee on Banking, Housing and Urban Affairs provided that:

> The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments. While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.
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> Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, . . . and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A), the amount by which the sum of the cost of utilities, . . . and local property taxes exceeds the initial operating expense level,

lem of escalating costs and rents for Section 236 projects, a problem which the interest reduction subsidy program could not ameliorate. Tenants' rents needed to be stabilized without subsidizing inefficient project management. Thus, the operating subsidy program was established to offset the escalating, but objectively ascertainable, costs of utilities and property taxes.

Subsequent legislative history demonstrates congressional adherence to its original intent.[15] In April 1975, the Report of the Senate Committee on Banking, Housing and Urban Affairs accompanying a bill designed *inter alia* to amend the National Housing Act expressed concern that the operating subsidy program was not being implemented and found that at that time there was "*in addition*" to contract authority $44 million in the reserve fund which was "*required*" to be used for additional operating assistance payments.[16]

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or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community. S.Rep. No. 93-693, *supra* at 32. *See also*, H.R. Rep. No. 1279, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code, Cong. & Ad. News 4449, 4475.

15. When the intent is clear, Congress "cannot be put to the necessity of acting twice before it is taken to mean what it said." *Pennsylvania v. Lynn*, 501 F.2d 848, 861 (D.C.Cir. 1974). However, courts have reviewed subsequent legislative history to see if that history sheds any light on the original legislation. 501 F.2d at 857-861.

16. The text provides, in pertinent part, as follows:

The Committee was informed that there is approximately $125 million in unused authority available to provide interest subsidies and operating assistance and, *in addition*, approximately $44 million in reserve as a result of the collection of excess rental charges. The reserve is required under Section

Most recently, in the 1977 Housing and Community Development Act, Congress amended and streamlined[17] the Section 236 operating subsidy provision. The new statute provides that: "[t]he Secretary is authorized to make, and shall contract to make to the extent of moneys in the reserve fund . . ." additional monthly assistance payments. Pub. L. No. 95-128, *reprinted in* H.R. Rep. No. 95-634, *supra* Appendix p. 1. This provision is interpreted by Congress as "direct[ing] the Secretary to make additional assistance payments . . . to the extent of funds in the reserve fund. . . ." *Id.* at 62-63.

There is no doubt that these amendments were adopted to clarify the prior intent of Congress. Numerous Senators and Representatives, speaking in support of a variety of amendments, recognized the mandatory nature of the operating subsidy program and decried the Secretary's con-

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236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act. S.Rep. No. 749, 94th Cong., 2d Sess. 10, *reprinted in* [1976] U.S. Code, Cong. & Ad. News 1885, 1894. (Emphasis added.)

See also, S.Rep. No. 93-1255, *supra*, which clarified language of a prior appropriations act.

17. In addition to restating that the operating subsidy program was mandatory and that the reserve fund must be used for its implementation, the 1977 amendments made the following changes: (1) Operating subsidy payments shall be used to reduce basic rents for a project. Henceforth tenants will pay either "basic rent" (12 U.S.C. § 1715z-1(f)(1) (Supp. V 1975); J.A. p. 56) or 25% of their income, whichever is greater. (2) Any contract to make operating subsidy payments shall be for a one-year period with future periodic adjustments. (3) Payments shall be made unless the Secretary finds that the property taxes or utility costs are not reasonable or comparable. (4) Payments made pursuant to the amendments shall be made as of October 1, 1977, although the Secretary has an additional 180 days to establish the initial operating expense levels. *See*, H.R.Rep. No. 634, 95th Cong., 1st Sess. 21-22, 62-63 (1977).

tinuing refusal to implement it.[18] The Congressmen who made these statements were well informed as to the intent of the 1974 Congress. Two of them were Senate conferees for the Housing and Community Development Act of 1974. One of these Senators was the ranking member of the 1974

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18. At least three different amendments were introduced to revise the operating subsidy program—the Pearson amendment, the Hanley amendment and the Chafee amendment.

Senator Pearson, in offering his amendment, co-sponsored by Senator Stone, stated that it "simply seeks to assure that express congressional intention in this area is no longer thwarted." 123 Cong. Rec. S2054 (daily ed., Feb. 2, 1977).

Representative Hanley, on behalf of his amendment, asked for the full support of the House because "[t]his provision . . . is already in the law. HUD has the authority resultant from the amendments to the Act in 1974." He further noted that his amendment represented the "will of . . . [the House] Committee [on Banking, Finance and Urban Affairs]." *Id.* at H4286 (May 11, 1977).

Senator Chafee, in support of his amendment—co-sponsored by Senators Humphrey, Cranston, Javits, Kennedy, Pell and Heinz—stated in answer to the question, "Why should HUD get into [providing operating subsidies for Section 236 projects]?" as follows: "The Act presently provides that they should do it, and HUD has refused to do it." *Id.* at S9042 (June 7, 1977). Senator Cranston, in support of the Chafee amendment, stated that "[d]espite compelling indications that Congress intended that the operating subsidy program be implemented, the former Secretary of HUD refused to pay such subsidies except when required to do so by court order." *Id.* at S9045. Senator Humphrey, also supporting the Chafee amendment, provided background on the 1974 Act by stating that: "In 1974 the Congress responded to the growing problems [in Section 236 projects] by adopting an operating subsidy for Section 236 projects that covered the most rapidly rising costs—that is, the real property taxes and the utility costs. And after we had done this, we were faced with intransigence by the administration—a stolid and unaccountable refusal to use the program." *Id.* Senator Pell, in support of the Chafee amendment, stated that: "I believe the time has come for the Senate to reconfirm its intent that HUD activate this program . . . [W]hen Congress passed the operating subsidy program in 1974 it was clear that HUD was mandated to provide operating subsidy funds for Section 236 housing projects experiencing substantial cost escalations." *Id.* at S9046. Senator Brooke also spoke in favor of the amendment. *Id.* at S9043-S9044.

Senate Subcommittee on Housing and Urban Affairs.[19] Thus, their views are entitled to great weight. *Compare, United States v. United Mine Workers of America,* 330 U.S. 258, 281-282 (1947).

In addition, the 1977 conferees were aware of the pending litigation including a nationwide class action covering all intended beneficiaries of the operating subsidy program. *Underwood v. Hills,* 414 F. Supp. 526. They stated that the position maintained by the Secretary was inconsistent with their prior intent.[20] Thus, they took steps to protect the interests of the Respondents and other Section 236 tenants who are eligible to receive the benefits of the operating subsidy. The conference report to the Housing and Community Development Act of 1977 provides that:

> [t]he conferees intend that these amendments shall not prejudice the rights or liabilities of any party presently before the courts seeking operating subsidy payments pursuant to Sections 236(f)(3) and (g). H.R.Rep. No. 95-634, *supra* at 63.

The only conclusion which can reasonably be drawn from the language of the statute, the contemporary and subsequent legislative history, and the scheme for expenditure of the reserve fund, is that Congress required the Secretary to make operating subsidies "so as to obviate the necessity of raising tenants' rents to cover these increased operating costs." Pet. Br., p. 7.

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19. Senator Proxmire was the ranking member of the 1974 Senate Subcommittee on Housing and Urban Affairs. He is now chairman of that committee. He was also a Senate conferee, along with Senators Cranston and Brooke. Senator Sparkman, the chairman of the 1974 Subcommittee on Housing and Urban Affairs, was also involved in this amendment process. He provided assistance to Senator Chafee in arriving at some of the conclusions supporting the Chafee amendment. *Id.* at S9044. *See,* fn. 18, *supra.*

20. *See,* pp. 23-24, *infra.*

C. THE SECRETARY'S ARGUMENTS THAT THE OPERATING SUBSIDY PROGRAM IS DISCRETIONARY ARE NOT PERSUASIVE

The Secretary argues that the language of the operating subsidy statute is permissive. Pet. Br., p. 7. In support of her argument, she points first to the contrasting terms used in the deep subsidy program. 12 U.S.C. § 1715z-1(f)(2).[21] Then, relying upon *Pennsylvania v. Lynn*, 501 F.2d 848, she claims that, as with the interest reduction program, she has discretion as to whether the program should be implemented. Respondents will demonstrate that there is no significant difference between the mandatory nature of the deep subsidy and operating subsidy programs and that *Pennsylvania v. Lynn* is inapposite.[22]

The Secretary's comparison of the deep subsidy and operating subsidy program is misleading. It turns solely upon the difference between isolated phraseology in the deep subsidy program—"shall make, and contract to make" —and in the operating subsidy program—"authorized to make, and contract to make." The accepted rule of statutory construction provides that to derive meaning from terms in a statute they must be read in context.[23] When applied here, that rule compels the conclusion that the operating subsidy program, like the deep subsidy program, is a mandatory component of the Section 236 program.

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21. It should be noted that under the Secretary's analysis, the deep subsidy program is mandatory insofar as she uses her available contract authority to construct new Section 236 units.

22. *Abrams v. Hills*, 547 F.2d at 1067-1068, *Abrams Cert.* Pet. App. p. 13a.

23. This Court has recently held that: "[i]n expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) citing *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849).

A comparison of the full text of the two programs reveals that both the deep subsidy and operating subsidy statutes begin with mandatory language. Both statutes contain the term "authorized" within the command matrix. And each program affords the Secretary a limited power to make selected determinations to facilitate the programs' operations such as determining, for the operating subsidy program, whether property taxes and utilities are reasonable and comparable and determining, for the deep subsidy program, whether to increase or decrease the percentage of tenants eligible to receive benefits.

The purposes of both programs are almost identical: to reduce rents to qualified tenants and to provide for an economic mix within each Section 236 project without threatening the solvency or effective management of the projects.[24] While there are distinctions between the programs, they have no impact on their mandatory nature. The deep subsidy program was designed to ensure that every project built after the effective date of the statute (August 22, 1974) would contain approximately 20 per-

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24. The Senate Report accompanying the Housing and Community Development Act of 1974, in introducing the changes in the Section 236 program which included primarily the operating subsidy program and the deep subsidy program, provided that:

> This program . . . grows out of the existing rental housing housing [sic] assistance program (Section 236 of the National Housing Act). However, while it retains features of existing law, it also contains numerous improvements in that law so as to be, in many ways, a new program rather than a simple continuation of the old. It is believed that these changes—including provisions to promote a mix of families with more widely varying income levels and to prevent excessive rent increases and assist sponsors in meeting increases in operating costs beyond their control—will help eliminate a variety of problems and permit the program to operate more effectively in the future.

S.R.Rep. No. 93-693, *supra* at 31.

cent lower income families, who would pay reduced rents. The operating subsidy program was designed to aid all eligible tenants in new or existing projects by paying that portion of their rents attributable to increased taxes and utilities. Thus, both of these programs were adopted and viewed together as a comprehensive solution to problems plaguing the Section 236 program. Congress intended that both programs be implemented. It did not intend that one program be selected in favor of the other or that one group of tenants be ignored in favor of another.

The practical explanation for why the programs were written in a slightly different format, as recognized by the Ninth Circuit, is that the deep subsidy program applied only to newly developed projects and the operating subsidy program is applicable primarily to *existing* but also to new projects. In dealing with existing projects, Congress wanted to ensure that the Secretary tightly administer the program and not reward poor management.[25] Thus, it avoided language which would require that *every* project receive an operating subsidy. For new projects, Congress wanted to ensure that every project be developed for at least a percentage of lower income families. Thus, different language was selected for the two programs.[26]

To the extent that increases in a particular project resulted from bad management or discriminatory taxation by a local agency, the Secretary would have discretion under the "authorized" language to deny that project an

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25. *See, Abrams v. Hills*, 547 F.2d at 1068, quoting S.Rep. No. 93-693, *supra* at 32. *See also*, fn. 14, *supra*.

26. Note that under the rent supplement program, which the deep subsidy program replaced, not every Section 236 project was required to be developed with an additional subsidy. *See*, 12 U.S.C. §1701s (Supp. V 1975).

operating subsidy. That limited discretion did not justify an across-the-board refusal to implement the program.

The Secretary also relied upon the District of Columbia Circuit Court opinion in *Pennsylvania v. Lynn*, 501 F.2d 848 to support her contention that the implementation of the operating subsidy program was totally discretionary. Her reliance, however, is misplaced. The *Lynn* Court, by narrowly[27] defining the Secretary's discretion, held that:

> the Secretary has the discretion . . . indeed the obligation to suspend the programs' operation when he has adequate reason to believe that [the programs] are not serving Congress's purpose of aiding specific groups in specific ways, or are frustrating the national housing policies applicable to all housing programs. 501 F.2d at 855-856.

Here, in contrast, the Secretary is claiming discretion not to implement the operating subsidy program because she prefers other programs and she claims that the operating subsidy program is administratively inefficient and that it is inequitable because it fails to benefit a sufficiently broad class of tenants. In fact, the *Lynn* Court itself anticipated this argument and rejected it: "it may be doubted whether mere concern about the equity and efficiency of a program duly established by Congress could, without more, support an executive decision to suspend its operation. . . ." *Id.* at 852.

The *Lynn* decision can also clearly be distinguished on its facts. There, the Secretary asserted authority to suspend a number of the principal housing programs, including the Section 236 interest reduction program. This, he claimed, was justified by a thorough study and evaluation. *Id.* at 861. No study or evaluation has been undertaken or offered to

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27. 501 F.2d at 862.

support the Secretary's determination not to implement the operating subsidy program. The suspension in *Lynn* was further justified because "structural features" of the housing programs, which were not amenable to administrative solutions, frustrated the purposes and intent of the programs. *Id.* at 865, 867. Here the excuse is policy distaste.[28] In addition, it is significant that operating subsidies were designed to help eliminate some of the "structural" problems and make the Section 236 program operate more efficiently. *See,* fn. 24, *supra.* In *Lynn,* suspension of the program was justified because billions of dollars would have been committed over periods up to forty years before congressional approval of the suspension could have been achieved. *Id.* at 856. With operating subsidies, the contracts can be for one year at a time[29] and the amount in the reserve fund is currently estimated to be $54.4 million. Finally, the *Lynn* Court found that continuation of the suspended housing programs would have frustrated the purposes and intent of Congress because the intended beneficiaries were not being helped. Here, in contrast, the Secretary *admits* that operating subsidies achieve the objective of reducing

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28. The Secretary's distaste for the operating subsidy program predates its enactment. HUD Assistant Secretary for housing, Crawford, when asked in a House committee hearing about operating subsidies, said that: "[w]e did not request operating subsidies" and the Secretary will not implement the program. *Department of Housing and Urban Development-Independent Agencies Appropriations for 1976, Hearings on H.R. 9070 before House Committee on Appropriations,* Part 5, 94th Cong., 1st Sess. 275 (1975).

29. *See, Department of Housing and Urban Development and Certain Independent Agencies Appropriations, Senate Hearings before Appropriations Committee, Fiscal Year 1977,* Part 1 Justifications, 94th Cong., 2d Sess. 49-50 (1976); *Department of Housing and Urban Development-Independent Agencies Appropriations for 1977, Hearings on H.R. 14233 before a Subcomm. of the House Comm. on Appropriations,* Part 6, 94th Cong., 2d Sess. 435 (1976) (hereinafter House Appropriations on H.R. 14233).

tenants' rents and subsidizing property taxes and utilities. Pet. Br., p. 7; J.A. p. 39.

The Secretary's argument that neither the interest reduction subsidy nor the operating subsidy programs are compulsory (Pet. Br., p. 9) ignores the long line of "impoundment cases."[30] These cases have recognized that if Congress establishes a program and provides funds, there is a presumption that it intended the program to be implemented absent an *express* statement to the contrary or an *express* statement leaving the question of implementation to the discretion of the executive.[31] The burden, therefore, is upon the executive to demonstrate that Congress granted

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30. "'[I]mpoundment' is an unauthorized executive refusal to expend appropriated funds, or in the words of section 1011 of the Congressional Budget and Impoundment Control Act of 1974, 'withholding or delaying the obligation or expenditure of budget authority . . . provided for projects or activities' or 'any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority. . . .' Act of July 12, 1974, Pub. L. No. 93-344, § 1101, 88 Stat. 297." Abascal and Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1547, 1551, fn. 6 (1974). It is clear not only from this definition but also from the letters of the Comptroller General of the United States to Congress that the Secretary illegally impounded the reserve fund. H.R. Doc. No. 466, 94th Cong., 2d Sess. (1976); H.R.Doc. No. 558, 94th Cong., 2d Sess. (1976).

31. *See*, for example, *Guadamuz v. Ash*, 368 F. Supp. 1233 (D.D.C. 1973) in which the Court provided that the Secretary of Agriculture could not terminate two different programs because:

> Congress, by authorizing the future obligation of funds by the Secretary of Agriculture, has indicated its intent that the program continue, at least for the period of time authorized. To accept the defendants' position, that absent a mandatory statement that a program be continued or be operated at a certain level, the Executive may terminate the program, would be to place a burden on the Congress not contemplated by our Constitution. 368 F. Supp. at 1241. *See also, Sioux Valley Empire Electric Association, Inc. v. Butz*, 367 F. Supp. 686 (D.S.D. 1973), *aff'd* 504 F.2d 168 (8th Cir. 1974); *Local 2677, American Fed. of Gov't. Emp. v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

it discretion not to implement the program. This burden cannot be met by merely stating a conclusion that the "statutory provision contains [no] imperative phrase that would render [the] subsidy compulsory." Pet. Br., p. 9.

II. The Secretary Need Not Use Contract Authority to Spend the Reserve Fund

Respondents submit that the decision of the Courts below—that the operating subsidy statute provides that the money in the reserve fund is immediately available for use —is fully supported by the language of the statute and the legislative history. Contrary to the position maintained by the Secretary (Pet. Br., pp. 14-15), no contract authority is needed to make expenditures from the reserve fund. The Secretary's analysis fails to recognize that a new funding scheme was created when the operating subsidy program was enacted. Thus, her prior funding precepts are inapplicable here.[32]

The operating subsidy statute provides that all rents collected in excess of basic rents "shall" be accumulated and paid to the Secretary who "shall" credit such money to the

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32. The basic funding scheme for those HUD programs that utilize contract authority is as follows. First, Congress enacts substantive legislation which establishes the program and authorizes that certain sums may be appropriated subject to specific contract limitations. Then, in subsequent appropriations acts, Congress does two things. It releases contract authority which permits the Secretary to enter into contracts with housing owners to pay them subsidies up to a specified maximum over an extended period, normally, forty years. Then it permits the Secretary to pay certain dollar amounts on such contracts during the fiscal year covered by the appropriation act.

The only facets of this procedure that are relevant to Respondents' arguments are that (1) contract authority for HUD programs is only released in appropriations acts and (2) the purpose of contract authority is to permit the Secretary to obligate funds for future years before they are appropriated.

reserve fund "to be used" to make operating subsidy payments. 12 U.S.C. § 1715z-1(g). There is no statutory limitation to the effect that expenditures from the fund can be made only if there is available contract authority. The fact that this statutory language makes the reserve fund money immediately available and dispenses with the need for contract authority is fully supported by statutory changes made by the 1974 amendments.

The reserve fund was established in 1968. From that time until August 22, 1974, the statute provided that the fund "may be used" to make Section 236 interest reduction subsidy payments. Any such use was made "subject to limits approved in appropriations acts."[33] This limitation and the Secretary's discretion to use the fund for interest reduction payments were removed in 1974 when the operating subsidy program was created. Congress thereby created a self-perpetuating, revolving fund free from the limits of appro-

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33. The law prior to August 22, 1974, provided as follows:
(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be deposited by the Secretary in a fund which *may be used* by him as a revolving fund for the purpose of making interest reduction payments with respect to any rental housing project receiving assistance under this section, *subject to limits approved in appropriation Acts pursuant to subsection (i)*. Moneys in such fund not needed for current operations may be invested in bonds or other obligations of the United States or in bonds or other obligations guaranteed as to principal and interest by the United States or any agency of the United States: *Provided*, That such moneys shall to the maximum extent feasible be invested in such bonds or other obligations the proceeds of which will be used to directly support the residential mortgage market. Housing and Urban Dev. Act of 1968, Pub. L. No. 90-488, § 201(a), 82 Stat. 476, 499 (1968), as amended by Housing and Urban Dev. Act of 1970, Pub. L. No. 91-609, §117(c), 84 Stat. 1770, 1774 (1970). (Emphasis added.)

priations acts[34] and made the money immediately available for operating subsidies.

Moreover, the operating subsidy program, when funded by the reserve fund, is fundamentally different from programs which use solely contract authority. Contract authority is essential when the government wishes to obligate itself, prior to an appropriation, to make payments for the current as well as future years. J.A. pp. 50, 53. If, however, the money is available prior to the creation of the obligation, contract authority is not necessary. In the case of the reserve fund, millions of dollars have been available since 1974. All Respondents ask is that this money be spent as Congress intended. No contract authority is necessary. The cash is in hand. Thus, agreements to make payments will not exceed the ability of the Secretary to pay.

Congress has expressly recognized that the reserve fund is separate from contract authority. The conference report accompanying the 1977 Housing and Community Development Act, Pub. L. No. 95-128, provided that:

> The conferees are further aware that HUD has asserted in litigation that it does not have sufficient contract authority to make such [operating subsidy] payments to the full extent of monies in the reserve fund. These amendments are intended *to clarify* that while the Secretary is authorized to enter into contracts with project owners to make such payments, no contract authority is needed to spend the reserve funds

34. The existence of a self-perpetuating fund that is not dependent upon congressional appropriations, and hence is not subject to the usual budgetary process, is not unique to the operating subsidy program. *See, Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir. 1945) which recognized that milk funds accumulated by assessment are not subject to appropriations; and *Emery v. United States*, 186 F.2d 900, 902 (9th Cir. 1951) which held that rent overcharges collected from landlords by the federal government in trust for the tenants were not subject to appropriations.

for operating subsidies. H.R.Rep. No. 95-634, *supra* at 63. (Emphasis added.) *See also*, S.Rep. No. 749, 94th Cong., 2d Sess. 10 (1976).

That contract authority need not be used is also supported by the statutory language which gives the Secretary the authority "to make and contract to make" operating subsidy payments. 12 U.S.C. § 1715z-1(f)(3). Respondents submit that this language, as the Ninth Circuit found, permits the Secretary to "make payments not under contract" and thus without regard to contract authority.[35] Furthermore, Respondents submit that even if the Secretary made payments pursuant to "contracts," this fact does not require the utilization of "contract authority." The Secretary administers several programs in which contracts are used, money obligated and no contract authority is utilized.[36]

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35. *See, Abrams v. Hills*, 547 F.2d at 1068 fn. 11, 1071, *Abrams Cert.* Pet. App. p. 14a fn. 11, 21a-22a. The Court in *Dubose* aptly noted that a comparison of the language of the public housing statute further supported this analysis. *See, Dubose v. Hills*, 405 F. Supp. 1277, 1283-1284 fn. 32, 1287 fn. 46.

36. The following programs authorize the Secretary to enter into contracts and expend money for housing programs. No contract authority is obligated under these programs, as is demonstrated in HUD's budget justifications submitted to the House Subcommittee on Appropriations. *See*, Housing counseling assistance program, 12 U.S.C. § 1701x(a) (Supp. V 1975), *Department of Housing and Urban Development-Independent Agencies Appropriations for 1978, Hearings before a Subcomm. of the House Comm. on Appropriations*, Part 6, 95th Cong., 1st Sess. 599-603 (1977) (hereinafter, House Appropriation Hearings, HUD 1978); Mobile home standards program research, 42 U.S.C. § 5407 (Supp. V 1975), *Id.* pp. 604, 606, 662; New technologies in the development of housing for lower income families, 12 U.S.C. §§ 1701z-2(e), 1701z-6 (Supp. V 1975), *Id.* pp. 625, 664, 684; Experimental housing allowance program (EHAP)—demand experiment, 12 U.S.C. § 1701z-3 (Supp. V 1975), *Id.* pp. 656-657; Fair housing program, 42 U.S.C. § 3608(d) (1970), *Id.* p. 724.

The Secretary's interpretation of the 1974 amendments makes little practical, political or fiscal sense. She first admits that they provide "that the reserve fund was to be available only to make operating subsidy payments." Pet. Br., pp. 13-14. Then she concludes that the amendments "simply limited the purpose for which the fund could be used and prevented its return to the Treasury or its commingling with appropriated funds for use in other housing programs." Pet. Br., p. 18. Under this view, the millions of dollars in the reserve fund would stand in limbo, to be used at the Secretary's whim or caprice.

This view both defies reason and contrasts starkly with the legislative history. Congress was aware that the reserve fund had been accumulating since 1968. The Secretary had not used it to make interest reduction subsidy payments. Thus Congress, eager to have the money spent, mandated its immediate release primarily for operating subsidies. Even the Secretary's ability to invest the reserve fund to support the residential mortgage market was removed. *See*, fn. 33, *supra*.[37]

The Secretary further argues her position is supported by Pub. L. No. 94-378 which makes surplus money in the reserve fund available for use in other programs. Pet. Br., p. 17. The Secretary misconstrues the statute and misreads the legislative history. Pub. L. No. 94-378, which is an appropriations act and thus of limited scope,[38] makes avail-

37. The Secretary's argument further ignores the fact that the interpretation of the need for contract authority for the operating subsidy program was developed through affidavits in the course of litigation. Thus no special weight should be accorded. *See, Davis Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944). *See also Morton v. Ruiz*, 415 U.S. at 237; *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *Baltimore & Ohio R.R. Co. v. Jackson*, 353 U.S. 325, 331-332 (1957).

38. *See, United States v. Vulte*, 233 U.S. 509, 514 (1914).

able money in the reserve fund for other housing programs if and when the needs of the operating subsidy program have been met. It does not, as contended by the Secretary, eliminate the requirement in the substantive legislation, that the fund be employed for operating subsidies nor does it demonstrate that the reserve fund is simply a substitute for appropriated funds and therefore requires contract authority to be expended. In pertinent part, the law contains the proviso "[t]hat excess rental charges credited to the Secretary in accordance with Section 236 (g) of the National Housing Act, as amended, shall be available . . . for the payments on contracts entered into pursuant to the authorities enumerated above." *Id.* 90 Stat. 1095, 1095 (1976). One of the enumerated authorities is the Section 236 program which includes, of course, the operating subsidy program.

The only effect of this proviso is to expand the Secretary's discretion over expenditures from the reserve fund once the needs of the operating subsidy program are fully met. Under the 1974 amendments, the excess in the reserve fund not needed for operating subsidies could only be used for the interest reduction subsidy program.[39]

The fact that Congress did not intend by the proviso contained in Pub. L. No. 94-378 to undercut the mandatory nature of the operating subsidy program and expected to see it implemented with the reserve fund is evident from the legislative history. The proviso itself originated in the House; when it reached the Senate, Senator Sparkman, then

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39. Pub. L. No. 94-378 does not, as claimed by the Secretary, indicate "Congress' disenchantment with the operating subsidy program" (Pet. Br., p. 20 fn. 20), but rather evidences Congress' frustration with the refusal of the Secretary to spend the reserve fund. Hence the statutory requirement that the money *"shall be available."* Pub. L. No. 94-378, 90 Stat., *supra* at 1095.

chairman of the Committee on Banking and Currency, stated that:

> HUD has failed to carry out [the operating subsidy program] despite the specific legislative authority conferred 2 years ago, despite the fact almost $25 million[40] in excess charges have been returned to HUD, and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision.
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> . . . [T]he General Accounting Office has informed HUD that the accumulated section 236 funds are covered by the Impoundment Control Act, and that, in the absence of a recision approval by the Congress, these funds must be obligated in accordance with the provisions of the 1974 act. HUD has failed to obligate the funds. I am informed that the GAO is now considering legal action in order to require HUD to follow the requirements of the Impoundment Control Act.
>
> Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized under section 236(g). 122 Cong. Rec. S10775 (daily ed., June 26, 1976).

Senator Proxmire, floor manager for the bill, agreed that "[i]t is most important that we do our very best to keep the section 236 tax and utility subsidy program going. It is a good program. It is for low-income people." *Id.* Thus, the Senate struck the contested proviso.

When the 1976 appropriations bill was reported out of the Conference Committee it did, however, contain the House version of the proviso. The Senate had agreed to the

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40. As of June 26, 1976, there was at least more than $40 million in the reserve fund. J.A. pp. 55, 59, 164, *see also*, p. 38 fn. 56, *infra*.

proviso in exchange for Conference Committee report language that protected the rights of Section 236 tenants and others who had or would file suit. To protect the rights of those people, the conference report provided in pertinent part that:

> Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.
>
> The Committee of conference is agreed that *this action shall not prejudice any suit now or hereafter before the courts in this area.*
>
> H.R. Rep. No. 1362, 94th Cong., 2d Sess. 5 (1976). (Emphasis added.)

Since Congress knew of the pending lawsuits brought by tenants and Section 236 project owners, the Conferees clearly intended to ensure that the tenants and project owners would receive the benefits of operating subsidies.

This construction of the 1974 amendments and Pub. L. No. 94-378 is consistent with general principles of statutory construction. This Court has declared that where there are two statutes enacted on the same subject they shall be interpreted so as to give effect to both. *United States v. Borden,* 308 U.S. 188, 198 (1939); *Morton v. Mancari,* 417 U.S. 535, 551 (1974). There is a presumption against construing a statute so as to render it ineffective. *Bird v. United States,* 187 U.S. 118, 124 (1902); *Blanchette v. Connecticut General Insurance Corp.,* 419 U.S. 102, 134 (1974). However, if there is a positive repugnance between the two acts then an implied repeal "is to be regarded only if necessary to make the [later enacted law] work and even then

only to the *minimum* extent necessary . . . ." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). (Emphasis added.)

The Secretary attempts to explain away the importance of this "no prejudice" language by claiming that the provision "means no more than that the availability of the reserve fund for other Section 236 programs after October 1, 1976, does not affect the right of litigants such as respondents to be paid from the reserve fund if they prevail on the merits." Pet. Br., p. 18 fn. 19. But this conclusion is inconsistent with the facts. Neither the House nor Senate version of the act ever contemplated that the proviso would nullify the mandatory nature of the operating subsidy program or that first priority for use of the reserve fund for that program would be removed. The reserve fund is still available to make operating subsidy payments. Furthermore, the proviso of Pub. L. No. 94-378 was agreed to by the conferees only after assurances that claims of past, present and future tenants would be preserved.[41]

Thus Respondents submit that the program is mandatory and that no contract authority is necessary for the release of the reserve fund.

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41. Even under the Secretary's interpretation, the *Abrams* Respondents would be entitled to operating subsidy payments from at least February 18, 1975, to October 1, 1977; whereas the *Ross* Respondents would be entitled to payments from May 1, 1975, to October 1, 1977. *See also*, 1 U.S.C. § 109 (1970), the general savings clause.

Compare, Train v. City of New York, 420 U.S. 35, 41-42 (1975) in which this Court, interpreting similar "no prejudice" language, found that pending suits were exempt from coverage of the act in question. Here, because of the nationwide suit *Underwood v. Hills*, 414 F. Supp. 526, all past, present and future tenant claims are pending and were pending at the time Pub. L. No. 94-378 was enacted.

See also, Dubose v. Hills, 420 F. Supp. 399, 402-403 (D. Conn. 1976) and *Abrams v. Hills*, 547 F.2d at 1071-1072, *Abrams Cert.* Pet. App. 20a-22a.

III. If the Secretary Possessed Discretion, She Abused that Discretion

Respondents believe that the operating subsidy program is mandatory and that no contract authority is necessary to spend the reserve fund. If this Court rejects that view, Respondents submit that the Secretary's failure to implement the program and allocate sufficient contract authority so that the reserve fund could be spent constitutes an abuse of discretion. Thus the judgments of the Courts below should be affirmed.

This Court, in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), set out the standard for review of agency action to determine abuse of discretion. In it a two-pronged test for reviewing agency action was established. It must first be determined whether the action was "within the scope of . . . authority"[42] and, second, whether the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. "To make this [latter] finding the Court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." 401 U.S. at 416.

A. THE SECRETARY IN DECIDING NOT TO IMPLEMENT THE PROGRAM CONSIDERED IRRELEVANT FACTORS

The Secretary and members of her staff have filed several affidavits attempting to justify her decision not to implement the program. Some of the reasons offered are patently absurd. For instance, she has stated that she will

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42. 401 U.S. at 415. For purposes of this discussion, Respondents are assuming that the decision not to implement the program was within the scope of the Secretary's authority. *But see,* pp. 6-14, *supra.*

not implement the program because (1) it is designed only to assist Section 236 projects (J.A. pp. 44, 157); and (2) the program will assist only projects in which tenants pay more than 25-30% of their adjusted incomes for rent (J.A. pp. 44, 157). In other words, she refuses to implement because to do so would achieve precisely the result intended by Congress. If these factors are considered "relevant" the legislative process has lost all meaning.

The Secretary also claims that implementation "would be excessively costly." Pet. Br. p. 23. The record is bare of any showing to support this claim. It was never raised below and there is absolutely nothing to suggest that it was one of the "relevant factors" considered by the Secretary in making her decision. It is a *post hoc* rationalization which this Court should disregard.[43]

Even assuming that these unsupported assertions of excessive costs are properly before this Court, Respondents submit that they are the consequence of deliberately positing an administrative scheme substantially more burdensome than is required. The Secretary claims that implementation requires constant recalculations including "a monthly review of all [tenant] income data." Pet. Br., p. 23 fn. 23. Rational administration imposes no such requirement. Tenant incomes may have to be adjusted and project owners may have to submit periodic reports, but the income data for all tenants need not be reviewed

43. The affidavits relied upon by the Secretary to make her administrative burden argument were developed in response to litigation. These facts have been presented only to this Court. There has been no opportunity to challenge or cross-examine the assertions. Thus these facts should not be considered by this Court. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 (1948). But if received they must be viewed critically as *post hoc* rationalizations. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 420.

monthly. The Secretary administers many housing programs for which a tenant or a homeowner receives a subsidy based upon a percentage of income. None of these programs, including the Section 236 interest reduction program, requires the project owners or mortgagees to review each family's income monthly. For these programs, annual or biennial reviews with emergency hardship reassessment are deemed sufficient.[44] In short, the Secretary created a straw person, set it ablaze and hoped that it would send the entire program up in smoke.

As a final—and preposterous—"relevant factor" supporting her decision not to implement, the Secretary cites the burden of running two programs—the 1974 operating subsidy program and the 1977 operating subsidy program—and having to locate former tenants in order to make back payments to them. Pet. Br., p. 24 fn. 23. In other words, she seeks to sustain a continuing violation of the law by relying on her prior lawlessness. To uphold her exercise of discretion on these grounds would be to sanction executive sabotage of the legislature. Moreover these allegations are untested and they are made for the first time here. There is nothing in the record to support them. Thus Respondents submit that the Secretary's decision not to implement the program cannot be sustained because it is based upon factors that are not only irrelevant, but also absurd.

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44. *See*, Section 236 interest reduction subsidy program, 12 U.S.C. § 1715z-1, 24 C.F.R. § 425.25; Section 236 deep subsidy program, 12 U.S.C. § 1715z-1(f)(2), 24 C.F.R. § 426.60; Section 101 rent supplement program, 12 U.S.C. § 1701s, 24 C.F.R. §§ 215.55, 215.60; Conventional public housing, 42 U.S.C. § 1437 *et seq.* (Supp. V 1975), 24 C.F.R. § 866.4(c); Section 8 housing assistance payment program, 42 U.S.C. § 1437f (Supp. V 1975), 24 C.F.R. §§ 880.222, 881.222, 882.212, 883.322, 886.124; Section 235 homeownership program, 12 U.S.C. § 1715z (1970 and Supp. V 1975), 24 C.F.R. § 235.10(c)(1).

B. THE SECRETARY'S DECISION NOT TO IMPLEMENT THE PROGRAM CONSTITUTED A CLEAR ERROR OF JUDGMENT

1. The operating subsidy program was specifically tailored to alleviate problems in the Section 236 interest reduction program and should have been implemented

The Secretary claims that her exercise of discretion was proper because it was reasonable to decide to honor *bona fide* commitments to produce new Section 236 rental units to the exclusion of the operating subsidy program. Pet. Br. p. 21. This argument collapses, of course, if the Court finds, as Respondents believe it should, *either* that contract authority need not be used to pay operating subsidies *or* that the Secretary had sufficient contract authority to meet interest reduction subsidy and deep subsidy commitments as well as operating subsidy program needs.

The Secretary's conclusion defies her own experience and demonstrates that her judgment was clearly erroneous. In 1973, the Secretary suspended the Section 236 program because of "structural problems" inherent in the program. The Secretary had determined that because the Section 236 interest reduction program was a fixed subsidy it was unresponsive to inflation, the utility crisis and escalating costs. As a result, the intended beneficiaries of the Section 236 program—lower income families—were not being assisted. Rents were too high and project owners tended to prefer higher income families. In addition, the program as a whole had a ten-year projected default rate of 20%.[45]

Congress, favoring a continuation of the Section 236 program, responded to these problems in 1974 by amending

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45. *See, Pennsylvania v. Lynn*, 501 F.2d at 865, 867; *Housing in the Seventies*, Report of the Department of Housing and Urban Development, *reprinted in Housing and Community Development Legislation—1973, Hearings before the Subcomm. on Housing of the House Comm. on Banking and Currency*, Part 3, 93d Cong., 1st Sess. (1973).

it to add the operating subsidy and deep subsidy programs. J.A. p. 39. The operating subsidy program in particular was designed to assist existing (as well as new) projects by increasing the subsidy, reducing rents and offsetting the cost of property taxes and utilities. *See,* p. 10, fn. 14, *supra*; J.A. pp. 39-40. In light of this history, it makes no sense for the Secretary to continue building Section 236 projects without providing them with operating subsidies which would help assure their success. Furthermore, by ignoring the needs of the existing Section 236 projects[46] she is reinforcing a pattern of escalating rents, defaults and foreclosures. Thus, in the name of production, the Secretary is building units which are actuarily unsound and ignoring the existing units, thereby promoting their withdrawal from the low-income housing market.

The Secretary, in her brief, further attempts to justify her production preference by claiming that she is merely following congressional desires.[47] Pet. Br., p. 22. However,

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46. The Secretary claims that she is assisting some of the Section 236 projects by providing Section 8 assistance, 42 U.S.C. § 1437f. This assistance, however, is insufficient to meet the needs of all of the projects eligible to receive operating subsidy payments. The Secretary estimates that there are over 400,000 Section 236 units. While over 111,000 units have been provided with Section 8 assistance, only approximately 79% of them were used for Section 236 projects. Pet. Br., p. 23 fn. 22. *See, Section 8 Housing Assistance Payments Program: The Loan Management Set-Aside,* Department of Housing and Urban Development, 17 (January 1977).

47. This is another justification that does not appear in any affidavit filed in these cases. It is merely counsel's *post hoc* rationalization which is entitled to no weight. *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-169 (1962).

Significantly, just two paragraphs before this statement, the Secretary states that her decision not to allocate contract authority to the operating subsidy program was reasonable because she "lack[ed] a clear statement from Congress as to its preference between the interest reduction and operating subsidy programs." Pet. Br., p. 20. The Secretary seemingly creates congressional preferences at whim.

the Secretary's reading of the legislative history is incomplete. It is true that Congress wanted the Section 236 program reactivated and production commenced. But there is no indication that it preferred the old, non-operating subsidy Section 236 program over the new Section 236 program. Congress wanted new construction with the new program: a Section 236 program with deep subsidies as well as operating subsidies.[48] Also, congressional concern over the failure of the Secretary to implement the operating subsidy program has been strong and consistent.[49] Thus, the Secretary's analysis that the production of Section 236 units was preferred over the implementation of the operating subsidy program is inconsistent with express congressional intent. It further demonstrates the unsoundness of her judgment.

2. Contract authority was available and should have been allocated

The Secretary alleges that she had insufficient contract authority to implement the program and spend the reserve fund. J.A. pp. 39, 155. This claim is inconsistent with the facts. She had contract authority available which she either did not use or allocated erroneously.

The Secretary improperly allocated more contract authority to the deep subsidy program than was intended by Congress. She is required to use the deep subsidy program for all Section 236 projects for which interest reduction subsidy contracts are entered into after August 22, 1974. For pre-August 22, 1974 projects, the rent supplement program was to be used.[50] Despite congressional instruc-

48. *See*, fn. 24, *supra* and S.Rep. No. 93-1255, *supra*.

49. *See*, 9-14, *supra*.

50. Congress specifically increased the available contract authority for the rent supplement program so that the Secretary would not have to use deep subsidies for pre-August 22, 1974 projects. *See*, Department of Housing and Urban Development-

tions to distinguish the pre- and post-August 22, 1974 projects, the Secretary allocated $2.9 million of contract authority to make deep subsidy payments to pre-August 22, 1974 projects. J.A. pp. 37-38. Indeed, she admits that more contract authority would have been allocated for this purpose if it had been available. J.A. p. 38.[51]

For each fiscal year since 1975, the Secretary estimated that she would have unused contract authority available. Her predictions were accurate.[52] This contract authority should have been allocated to the operating subsidy program and used to spend the reserve fund. If it had been, the

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Independent Agencies Appropriations Act, 1976, Pub. L. No. 94-116, 89 Stat. 581, 582 (1975); H.R.Rep. No. 313, 94th Cong., 1st Sess. 6 (1975); S.Rep. No. 326, 94th Cong., 1st Sess. 16 (1975).

51. Respondents believe that the Secretary may have allocated more contract authority to the pre-August 22, 1974, Section 236 projects. In an affidavit filed in *Ross*, it is stated that, as of July 1, 1974, there was $181.36 million of unreserved contract authority, $28.2 million of which was programmed for deep subsidies. J.A. pp. 51-52. The Secretary, in her brief, now claims that at the beginning of fiscal year 1976 there was approximately $125 million of contract authority, $50 million of which was reserved for the deep subsidy program. Pet. Br., pp. 10-11. Because these latter facts are before this Court for the first time in these cases, Respondents have had no opportunity to challenge them. But we believe there may be an unwarranted increased allocation of $21.8 million of contract authority to the deep subsidy program.

52. The following table summarizes the Secretary's own figures regarding availability of contract authority:

	Spring '75	6/30/75	Spring '76	6/30/76	Spring '77	9/30/76
	(Figures in Thousands)					
Estimated Available Contract Authority	$73,163*		$23,000†			$11,000§
Actual Available Contract Authority		$125,000†		$38,453§	$35,409§	

**Department of Housing and Urban Dev.-Independent Agencies Appropriations for 1976, Hearing on H.R. 9070 before a Subcomm. of the House Comm. on Appropriations*, Part 5, 94th Cong., 1st Sess., 163 (1975).

†House Appropriation Hearings on H.R. 14233, *supra* at 351.

§House Appropriation Hearings, HUD 1978, *supra* at 309.

operating subsidy program could have been implemented even on the Secretary's terms.

Operating subsidy contracts are short term, usually for one year.[53] Thus the contract authority allocated to those contracts would be recaptured at the end of each fiscal year. "Recapture" of Section 236 contract authority is a familiar principle, applied by the Secretary to the interest reduction subsidy program when, for example, a project is sold, foreclosed or a contract is otherwise terminated.[54] She has also applied this principle to those operating subsidy contracts reluctantly entered into pursuant to Court order. As those yearly operating subsidy contracts expire, the contract authority utilized for one year becomes available for allocation in the succeeding fiscal year, either to honor deep subsidy and interest reduction commitments or to make further operating subsidy payments.[55] Thus, the Secretary could have implemented the operating subsidy program and met all her *bona fide* commitments.[56]

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53. House Appropriation Hearings on H.R. 14233, *supra* at 435.

54. *See*, 12 U.S.C. § 1715z-1(i) which provides that the amount of contract authority available to the Secretary after release in appropriations acts is limited only to the extent of "outstanding" contracts. *See also*, S.Rep. No. 1216, 91st Cong., 2d Sess. 5 (1971); *Recapture of Rent Supplement Contract Authority*, Memorandum to Patricia R. Harris, Secretary, from Ruth T. Prokop, August 11, 1977.

55. In other words, if $23,000 is contracted for and liquidated in fiscal year 1975, $23,000 of contract authority is used in fiscal year 1975 but available for reallocation in fiscal year 1976. In contrast, the contract authority would not be available for reallocation in fiscal year 1976 if the $23,000 represented annual payments for a forty-year period of time. In this latter situation, the contract authority utilized would be available again only at the end of the 40-year period or when the contract was terminated. *See also*, fn. 29, *supra*.

56. Significantly, if the Secretary had used available contract authority *in addition to* the money in the reserve fund the operat-

IV. The Secretary's Determination Not to Implement the Operating Subsidy Program Is Subject to Judicial Review

The Secretary's penultimate and least convincing argument is that the exercise of her discretion in allocating available housing resources is subject to review only by "the President and not by the courts." Pet. Br., p. 5. This same argument was raised in both *Train v. City of New York*, 420 U.S. at 46, and *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136, 138 (1975). This Court did not even consider the argument worthy of comment.

This claim must fail because the Secretary has not carried the heavy burden required to sustain a claim of non-reviewability. The Administrative Procedure Act, 5

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ing subsidy program could have been fully implemented for each year and there would still be a remainder of over $10 million in the reserve fund as of September 30, 1977. This point can be graphically demonstrated by using figures supplied by the Secretary. For fiscal year 1975, the estimated cost to implement the operating subsidy program nationwide was $2,717,000 per month or approximately $12 million for February 18-June 30, 1975. J.A. p. 38. In fiscal year 1976, the cost estimate increased to $51.4 million yearly or approximately $4.3 million per month. J.A. pp. 38, 39. No figures are available for the transition quarter, July 1-September 30, 1976, but assume $4.3 million per month or approximately $13 million. In fiscal year 1977, the need diminished to $43 million yearly. *See*, Pet. Br., p. 12 n. 13. The reserve fund has been estimated throughout this litigation to be $31,556,312, May 9, 1975 (J.A. pp. 50, 53); $37,823,293, August 31, 1975 (J.A. pp. 151, 161, 164); $40,647,789, October 31, 1975 (J.A. pp. 55, 59, 164); $54.4 million, December 31, 1976, and accumulating at the rate of $12 million a year (Pet. Br., p. 14).

The need for $12 million for fiscal year 1975 could easily have been met from the $125 million in contract authority. For fiscal year 1976, the estimated $51.4 million need could have been met with $38.4 million of contract authority plus $13 million from the reserve fund. The $13 million need for the transition quarter could have been met entirely from available contract authority and the estimated $43 million need for fiscal year 1977 could have been met with the estimated $11 million of contract authority plus $31.8 million from the reserve fund. If this were done there would still be available well over $10 million in the reserve fund ($54.4 million minus $44.8 million plus accumulations of $1 million per month since December 31, 1976).

U.S.C. § 701 *et seq.* (1970) provides that actions of federal agencies are subject to judicial review—"except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701. Obviously, Congress has not expressly precluded judicial review.[57]

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 this Court stated that the "committed to agency discretion" exemption is applied only where "statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410. In these cases there is a clear, straightforward and specific law to apply: the operating subsidy provision. It tells the Secretary what to do—use the reserve fund for operating subsidy payments—and how to do it—establish an initial operating expense level. Thus, the Secretary cannot elude judicial oversight by this route.

The Secretary further contends that her discretion may not be judicially overridden because it involves evaluation of national housing needs and predictions about the relative effectiveness of alternatives available for meeting those needs. However, no such wide ranging endeavor was contemplated by the operating subsidy statute. Congress made the determination that the program be implemented and provided funds with which to do so. It clearly did not intend that the national housing needs be ignored or that the exploration of other housing alternatives be precluded. But the very existence of the operating subsidy statute, coupled with Congress' continuing support in the face of

57. To hold that Congress has precluded review, there must be a "showing of 'clear convincing evidence' of a . . . legislative intent to restrict review." *Abott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). *Compare*, 12 U.S.C. § 1735b(e) (Supp. V 1975) in which judicial review is specifically precluded.

the Secretary's recalcitrance, demonstrate a clear congressional directive to implement. *See,* pp. 7-14, *supra.*

The cases cited by the Secretary do not support her position. Significantly, in none of the cases did the Court refuse to review the particular administrative action. In short, the cases are, if anything, supportive of Respondents' position. Both *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803) and *United States ex rel Redfield v. Windom,* 137 U.S. 636 (1891) provide that the executive may be compelled to act if the duty to be performed is ministerial. *National Broadcasting Co. v. United States,* 319 U.S. 190, 224 (1943) further elaborates on this principle by providing that the Court's duty in reviewing agency action for an abuse of discretion is limited to finding that the action is pursuant to authority granted by Congress and based on findings supported by evidence. And, finally, in *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134 (1940), this Court, in defining the relationship between administrative agencies and the judiciary, held that the Courts may correct an agency's interpretation of the law, but can only require compliance with that interpretation in a manner that does not interfere with the agency's exercise of its statutory duties. 309 U.S. at 145.

Respondents, for purposes of their argument, do not quarrel with these principles of law. In fact, they submit that these principles support their position: that Courts have a duty to review agency action to assure that it comports with the statute and, further, to enforce compliance if it is found that the executive has violated the statute. Respondents submit that the operating subsidy is mandatory and the Secretary's failure to implement it is subject to judicial review.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that this Court should affirm the decisions of the Fourth and Ninth Circuits if it finds that the operating subsidy program was mandatory or that the program is not mandatory but the Secretary abused her discretion in failing to implement it. Alternatively, if this Court finds that the program is not mandatory and the record is insufficient to determine whether the Secretary has abused her discretion then the cases should be remanded to either the District Court for further findings on the "full administrative record before the Secretary at the time [she] made [her] decision" (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402) or to the Secretary "for further consideration" (*Camp v. Pitts*, 411 U.S. 138, 143 (1973)).

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